IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 18956 of 2005
With
CIVIL APPLICATION No. 2282 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PARENTS ASSOCIATION OF MEDICAL/DENTAL STUDENTS - Petitioner(s)
Versus
DEAN PRAMUKH SWAMI MEDICAL COLLEGE & 7 - Respondent(s)

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Appearance :
MR JR NANAVATI WITH AR THACKER for Petitioner(s) : 1,
MR DC DAVE for Respondent(s) : 1,
MR MITUL K SHELAT for Respondent(s) : 2 - 4.
MRS VD NANAVATI for Respondent(s) : 5 - 6.
MS MANISHA L SHAH AGP for Respondent(s) : 7,
MR BP TANNA SR. ADV. WITH MS. MN KERRAVALA for TANNA ASSOCIATES for Respondent(s) : 8,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 07/10/2006

ORAL JUDGMENT

1. Rule. Learned advocate Shri D.C.Dave wavies service of rule on behalf of respondent no.1, Shri Mitul Shelat for respondent nos. 2 to 4, Mrs. Nanavati for respondent no.5 and 6, Ms. Shah for respondent no.7 and Shri B.P.Tanna Sr. Advocate with Ms. Kerravala for respondent no.8.

2. In this petition, though number of issues regarding the fee structure of the respondents-Education Institutions have been raised in this petition, by virtue of certain subsequent developments, it is agreed that question of providing for a proper fee structure needs to be placed before respondent no.8-Justice R.J.Shah (retired) Fee Committee (medical) for self-finance institutions. Eventually, therefore, this Court was called upon to adjudicate only with respect to one aspect of the petition, namely question of scholarship offered to

some of the students of respondent no.1-college.

3. Before outlining this controversy, it may be noted that the petitioner had raised certain grievances about the fees being collected by the private self-financed institutions who are respondent nos. 1 to 7 herein.

3.1. It is stated that in a somewhat similar but parallel litigation, the proceedings went right upto the Hon'ble Supreme Court and SLP was disposed of by an order dated 3rd July, 2006 in following terms:

> “Leave granted.
>
> These matters relate to fee fixation in the medical and physiotherapy colleges. The question of fixation of fee now stands settled by judgment of this Court in P.A.Inamdar vs. State of Maharashtra (2005) 6 SCC 537. In the light of the said judgment, the impugned judgment of the High Court cannot be sustained and the fee is required to be fixed by the Fee Fixation Committee having regard to the decision in P.A.Inamdar's case (supra). Accordingly, we set aside the impugned judgment and remit the matter relating to fee fixation for the

> Academic Years 2003-3004, 2004-2005 and 2005-2006 to the Fee Fixation Committee for fresh fixation of fee in the light of the judgment in P.A.Inamdar's case. It would also be open to the colleges to seek appropriate interim directions from the Committee in respect of the amounts for the year 2005-2006. Similarly, it would be open to the students or their representatives/associations to plead before the Committee that the Management has not complied with the directions already made and seek appropriate directions in that regard. Both these aspects would be considered by the Committee and appropriate directions issued.
>
> The appeals are disposed of accordingly."

4. Learned advocates appearing for the parties, therefore, agree that the question of fee structure of these self-financed colleges also needs to be placed before the Committee for its consideration. Accordingly, it is provided that for the academic years 2003-2004, 2004-2005 and 2005-2006, the issues are remitted to respondent no.8-Committee for fresh fixation of fees in light of the decision of Hon'ble Supreme Court in the case of P.A.Inadmar's vs. State

of Maharashtra reported in (2005) 6 SCC 537. These issues be considered by the Committee expeditiously and fresh decision be taken in accordance with law. Until such time decision is taken by the Committee, the present fee structure will operate on provisional basis and the concerned colleges will collect fee from students accordingly by way of ad-hoc arrangement subject to final decision of the Committee.

5. Having thus cleared the decks for the consideration of sole surviving issue, it would be necessary to briefly outline facts leading to this aspect of the matter.

6. On 27th February, 2004, on behalf of respondent no.1, a communications were made individually to the students concerned stating inter alia that the student has been selected for awarding of need based scholarship under “HM Patel Programme for Academic Excellence.” The amount of scholarship would be equivalent to 50% of the tuition fees as existing at present. The scholarship is a continuing scholarship

and would be valid for the entire course. It would, however, be necessary for the student and his guardian to execute a joint agreement as per the enclosed draft. Accordingly, an agreement was signed between the college and the concerned students and their guardians on or around 22nd March, 2004. In the said agreement, it was stated inter alia that the student has accepted the scholarship under the scheme of HM Patel Programme for Academic Excellence and he has been awarded a special scholarship for completing the course by giving 50% less fees then the fees decided by the second party or which may be fixed from time to time by the second party. It is further stated that for availing of the scholarship there needs to be a commitment from the student to serve the society voluntarily and the student has agree to serve the trust for a period of three years after completion of the course and the guardian of the student has also consented to such a term. It is further provided that the Mandal shall provide financial assistances to the student by way of charging only 50% of the course fee as may be fixed by the competent authority from time to time. It is

also stated that the student is aware of the existing fee structure and also policy for future revision of fee structure from time to time. It is provided that in case if student successfully completes the studies and dully qualifies and completes the internship fixed by the competent authority, the students shall serve at a place specified by the Mandal for a period of three years after the completion of the period of study. For breaching the condition of rendering service, the student was liable to refund the financial assistance granted with 12% interest. Student was also liable to pay Rs. 50,000/- by way of liquidated damages for breach of agreement. The student concerned was also required to furnish surety bond to fulfill the conditions of the agreement.

7. It is the case of the petitioner that some of the students of the petitioner association were granted scholarship by respondent no.1-college while granting admission to the medical college. By letter dated 7th September, 2005, respondent no.1 informed the concerned students that they have been granted scholarship under the prescribed scheme and as per

the scheme they will have to pay fees of Rs.1.38 lacs per year which effectively meant scholarship of 50% considering the fee prescribed by the college at the rate of Rs.2.75 lacs on yearly basis. It was, however, conveyed that for the year 2005-2006 as against the fee structure of Rs.1.45 lacs also they will have to pay fee of Rs.1.38 lacs. It is this communication that aggrieved the concerned students whose cause is espoused by the association.

8. Broadly stated the case of the petitioner is that initially fee structure proposed to be implemented by the respondent no.1-college was of Rs.2.75 lacs per year. However, it was not possible for respondent no.1-college to unilaterally fix its fee structure and the task was assigned to respondent no.8-Committee by way of judicial pronouncements. Eventually, the Committee provided for collection of fee at the rate of Rs. 1.45 lacs per year. It was at that stage that the disputes between the parties arose. Stand of the petitioner is that as per the scheme for scholarship and the agreement between the parties, the concerned students are entitled to

receive scholarship to the extent of 50% of the fees payable by the students and that, therefore, the concerned students would be required to pay only 50% of Rs.1.45 lacks per year which was the fee fixed by the Committee. On the other hand the stand of respondent no.1-college is that under the scheme the students were entitled to scholarship of 50% of the fees by way of scholarship considering the fee structure of Rs.2.75 lacs adopted by the college and ultimately if the same was substituted by the fees at the rate of Rs.1.45 lacs by the Committee, the students would still have to pay Rs.1.38 lacs as fees (considering 50% of the fees of the original Rs.2.75 lacs projected by the college)

8.1. It may be noted that by virtue of remanding the question of providing fee structure by the Committee, at present even the fee of Rs.1.45 lacs per year has not achieved finality and fresh fee structure would be provided for by the Committee. However, it was agreed between the contesting parties that this Court should nevertheless take up the question of the scholarship to be provided by

respondent no.1-college.

9. Appearing for the petitioner learned advocate Shri J.R.Nanavati submitted that from the material on record, it is clear that the intention on the part of respondent no.1-college clearly was to provide for wavier of 50% of the fees as may be applicable at a given point of time. From the communication dated 27th February, 2004, as well as from the agreement dated 22nd March, 2004, according to learned advocate for the petitioner this intention was clearly emerging. He submitted that one of the conditions of the agreement is “that the Mandal shall provide financial assistance to the students by way of charging only 50% of the course fee as may be fixed by the Competent Authority from time to time.”

9.1. He further submitted that the term competent authority has to be understood as the Committee which by the time this agreement was entered into between the parties, was already envisaged by the Hon'ble Supreme Court in the case of Islamic Academy of Education and Anr. vs. State of Karnataka and Ors.

reported in (2003) 6 SCC 697. He, therefore submitted that by the time when the agreement was entered into between the parties, respondent no.1-college had lost its authority to unilaterally provide for a fee structure and reference to the competent authority must be understood as one to be fixed by the fee committee. He further submitted that for availing of the scholarship the students concerned had to agree to serve a bond and to render his service for a period of three years at a place so directed by the trust. He, therefore, submitted that respondent no.1 could not have thereafter insisted on collecting 50% of the fees as originally envisaged which was at the rate of Rs. 2.75 lacs per year which no longer held the field. He submitted that in effect the implication of the stand of respondent no.1 would be that for a paltry sum of Rs.7,000/- per year being offered as scholarship, concerned students would have to serve for a period of three years as directed by the trust.

10. On the other hand learned advocate Shri D.C.Dave appearing for respondent no.1 opposed the petition.

He submitted that the intention of respondent no.1 was to charge 50% of the fees as was prevailing at the relevant time which was Rs.2.75 lacs per year. In turn it would mean that the students concerned shall have to shell out from his own resources amount of Rs.1.38 lacs per year by way of fees. Ultimately, if the fee structure undergoes any revision, the students would still have to continue to pay Rs.1.38 lacs per year, remaining component of the fees being borne by respondent no.1-college by way of scholarship in favour of the concerned students.

10.1. He submitted that respondent no.1 had offered to the concerned students to rescind the entire agreement if it was not possible for them to abide by it in view of changed circumstances.

10.2. He however focused mainly on the question of maintainability of the petition. Two aspects of his averments were that petition is not maintainable against respondent no.1 since respondent no.1 is not a State and secondly that a writ petition for enforcement of a contract should not be entertained.

11. Placing reliance on the decision of Hon'ble Supreme Court in the case of Binny Ltd. And Anr. vs. Sadasivan and Ors. reported in AIR 2005 Supreme Court 3202, he submitted that respondent no.1 not being a State, writ petition would not be maintainable against respondent no.1. In any case writ cannot be issued for enforcement of a duty which is not in the nature of public duty being discharged by respondent no.1.

11.1. He also placed reliance on the decision of Hon'ble Supreme Court in the case of G.Bassi Reddy vs. International Crops Research Instt. and Anr. reported in AIR 2002 Supreme Court 1764, wherein in paragraph 28 the Hon'ble Supreme Court dealt with question as to what would define a public function or a public duty.

11.2. Decision in case of Full Bench of Andra Pradesh High Court in case of Sri Konaseema Co-opeartive Central Bank Ltd., Amalapuram and Anr. vs. N.Seetharama Raju reported in AIR 1990 A.P.171, was

also relied upon wherein the Full Bench of the A.P. came to the conclusion that for enforcement of contractual obligations not flowing from statutory provisions cannot be enforced by way of writ petition. It was held that to challenge the termination of service of an employee of a cooperative society writ petition would not be maintainable.

11.3. Reliance was also placed in the case of K.Narendra vs. Riviera Apartments (P) Ltd. reported in AIR 1999 Supreme Court 2309 to urge that writ petition for enforcement of contractual rights should not be entertained. For the same purpose, decision in case of State of U.P.& Anr. vs. Johri Mal reported in AIR 2004 Supreme Court 3800 was also relied upon.

12. At the outset, it would be necessary to first take up the question of maintainability of the writ petition.

13. It is not in dispute that respondent no.1 is not a State within the meaning of Article 12 of the

Constitution. Respondent no.1 is a self-financed educational institution imparting education in medical branches. Not receiving any aid from the Government and being otherwise free from all perversive government control, there is no doubt that respondent no.1 is not State within the meaning of Article 12 of the Constitution.

14. Question of maintainability of writ petition however needs to be judged from the angle of the nature of functions performed by respondent no.1.

15. In a recent decision dated 8th September, 2006 rendered in Special Civil Application No.18274/06 and connected matters with respect to maintainability of writ petition against self-financed educational institutions, this Court had made following observations.

> “10. Yet another aspect of maintainability of the petitions is whether writ would lie against respondents no. 4 to 14. In this regard, it is not urged by the petitioners also that these respondents are “State” within the meaning of Article 12 of the Constitution of India.

However, what is sought to be suggested is that they discharge important public functions and carry important public duties. Their action in discharge of such public function must confirm to the reasonableness test flowing from Article 14 of the Constitution of India. If there is any deviation thereof, mandamus would lie.

10.1 In case of Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Samarak Trust and others v. V.R. Rudani and others (supra), Hon'ble Supreme Court in paragraph 21 observed that mandamus cannot be denied on the ground that duty to be enforced is not imposed by the statute. It was observed that mandamus is a very wide remedy which must be easily available to reach injustice wherever it is found.

10.2 In the case of Unni Krishnan J.P. and others etc. etc., v. State of Andhra Pradesh and others etc. etc.(supra) Hon'ble Supreme Court while observing in paragraph 80 of the decision that it is impossible to hold that a private educational institution either by recognition or affiliation to the University could ever be called an instrumentality of State, further observed in paragraph 81 that they discharge a public duty. It was further observed that if therefore, what is discharged

by the educational institution, is a public duty that requires to act fairly. The Hon'ble Supreme Court thereafter, taking note of the decision rendered in the case of Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Samarak Trust and others v. V.R. Rudani and others (supra), in paragraph 83 made following observations :

“The emphasis in this case is as to the nature of duty imposed on the body. It requires to be observed that the meaning of authority under Article 226 came to be laid down distinguishing the same term from Article 12. In spite of it, if the emphasis is on the nature of duty on the same principle it has to be held that these educational institutions discharge public duties. Irrespective of the educational institutions receiving aid it should be held that it is a public duty. The absence of aid does not detract from the nature of duty.”

10.3 In the case of Miss. Mohini Jain v. State of Karnataka and others(supra), also the Hon'ble Supreme Court observed that every citizen has a right to education under the Constitution. The State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through State-owned or State-recognised educational institutions. It

was further observed that Indian civilisation recognises education as one of the pious obligations of the human society.

10.4 In the case of Zee Telefilms Ltd. and another v. Union of India & others reported in (2005) 4 Supreme Court Cases 649, the Hon'ble Supreme Court made following observations :

“156. Having regard to the modern conditions when the Government is entering into business like the private sector and also undertaking public utility services, many of its actions may be state action even if some of them may be non-governmental in the strict sense of the general rule. Although the rule is that a writ cannot be issued against a private body but thereto the following exceptions have been introduced by judicial gloss:

(a) Where the institution is governed by a statute which imposes legal duties upon it.

(b) Where the institution is “State” within the meaning of Article 12.

(c) Where even though the institution is not “State” within the purview of Article 12, it performs some public function, whether statutory or otherwise.”

10.5 It can thus be seen that even if the Body or Authority is not “State” within the

> meaning of Article 12 of the Constitution, a writ of mandamus would lie if it is shown that the Body is discharging public function and the action complained of is in discharge of such public function. In the present case, it cannot be denied that respondents no. 4 to 14 who are imparting education are discharging important public function and are carrying out important public duty. They therefore, have a duty to act fairly in the process of granting of admissions. Large number of students are vying for such admissions. The students are seeking admission on the basis of their merits. Any deviation from this principle, would be opposed to the provisions contained in Article 14 of the Constitution. If there is any complain about the procedure in granting admissions, writ petition would be maintainable. This question is therefore, answered accordingly."

16. It can thus be seen, that even if a body or authority is not State within the meaning of Article 12 of the Constitution, a writ of mandamus would lie if it is shown that such a body is discharging public function and the action complained is in discharge of such pubic function or pubic duty.

17. In case of Binny Ltd. and Anr. vs. Sadasivan

and Ors (supra), the Hon'ble Supreme Court observed as follows:

> “29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel the public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of pubic duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the pubic law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of

such power is immaterial, but, nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish between public law and private law remedies. According to Halsbury's Laws of England 3rd ed. Vol.30, page 682, “a public authority is a body not necessarily a county council, municipal corporation or other local authority which h as public statutory duties to perform and which perform the duties and carries out its transactions for the benefit of the public and not for private profit.” There cannot be any general definition of public authority or public action. The facts of each case decide the point.”

17.1. In the case of Zee Telefilms Ltd. & Anr. vs. Union of India & Ors. reported in (2005) 4 Supreme Court 649, the Hon'ble Supreme Court made following observations:

“154. A writ issues against a State, a body exercising monopoly, a statutory body, a legal authority, a body discharging public utility services, or discharging some public function. A writ would also issue against a private person for the enforcement of some public duty or obligation, which ordinarily will have statutory flavour.

155. Judicial review casts a long shadow and even regulating bodies that do not exercise statutory functions may be subject to it. [Constitutional and Administrative Law, by A.W. Bradley and K.D. Ewing (13th Edn.), p.303].

156. Having regard to the modern conditions when the Government is entering into business like the private sector and also undertaking public utility services, many of its actions may be State action even if some of them may be non-governmental in the strict sense of the general rule. Although the rule is that a writ cannot be issued against a private body but therto the following exceptions have been introduced by judicial gloss:

(a)Where the institution is governed by a statute which imposes legal duties upon it,
(b) Where the institution is “State” within the meaning of Article 12.
(c) Where even though the institution is not “State” within the purview of Article 12, it performs some public function, whether statutory or otherwise.

159. This aspect of the matter has been considered in Andi Mukta Sadguru. It has clearly been stated that a writ petition would be maintainable against other persons

> or bodies who perform public duty. The nature of duty imposed on the body would be highly relevant fro the said purpose. Such type of duty must be judged in the light of the positive obligation owed by a person or authority to the affected party.
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> 160. In Assambrok Exports Ltd., v. Export Credit Guarantee Corpn., of India Ltd., it has been held that public law remedy would be available when determination of a dispute involving public law character is necessary. The said decision has been affirmed by this Court in ABL International Ltd., v. Export Credit Guarantee Corpn., of India Ltd. (See also Tata Cellular v. Union of India, SCC paras 83 and 84 ; AIR paras 101 & 102 and State of U.P., v. Johri Mal.)”

18. The crux of the question is whether in granting scholarship, respondent no.1 was discharging an important public function or a public duty.

19. As observed by Hon'ble Supreme Court in the case of G.Bassi Reddy vs. International Crops Research Instt. and Anr. (supra), it is observed in para 28 that it is not easy to define what a public function or a public duty is.

20. In this regard, it may be recalled that the respondent no.1-college had offered a certain scholarship to meritorious students who otherwise could not afford to pay the full fees. Term scholarship however appears to be a bit of misnomer and in reality for availing of the concession, the students had to undertake to serve out a bond. This entailed that the students concerned would have to serve for a period of three years upon completion of his studies at a place of the choice of the institution. For breach of this agreement, the students would have to refund the scholarship so enjoyed by them as well as to pay certain liquidated damages. Therefore, it was a matter of contract between the students and the educational institutions concerned. Both sides had to agree to perform a part of the contract.

21. In offering such scholarship and in turn demanding discharge of duties by such students in rural area, respondent no.1 was not discharging any statutory duty. There was no statutory obligation on

the part of the respondent no.1 institution to offer such scholarship. It was only a matter of a free choice of the institution to offer such scholarship. Giving of scholarship was otherwise also not akin in public duty or public function. In that sense of the term, respondent no.1 was not discharging any public function or public duty while offering scholarship to the students on certain terms and conditions. It was a matter of choice of the institution to offer scholarship on certain terms, equally it was a matter of choice of the student concerned to accept or not to accept such a scholarship which was conditional upon acceptance of certain terms. It was a matter of pure contract between the parties and no element of statutory flavour or discharging of any public function was involved. In that view of the matter, writ of mandamus would lie against respondent no.1, only so far as its action is in discharge of public functions or public duties. While offering scholarship, respondent no.1 was not discharging any public function or public duty so as to be amenable to writ jurisdiction of this Court. I am, therefore, of the opinion that for rectifying the alleged wrong

which is impugned in this petition, against respondent no.1 writ petition would not be maintainable.

22. In view of this conclusion, despite my serious doubt about the legality of action of respondent no.1, I am unable to entertain the petition. The same is, therefore, rejected only on the ground of maintainability.

23. With respect to fee structure of all respondent colleges, I have already given suitable directions in the earlier part of the judgment and subject to the above observations, the petition is disposed of in these terms.

24. Rule is made absolute to the extent of remanding the question of fee structure for respondent no.8-Committee to take a fresh decision. No costs.

25. In view of the main matter being disposed of, Civil Application does not survive.

(Akil Kureshi, J.)

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